

# Judicial Regulation of the Legal Profession in the United States

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Mark I. HARRISON\*

## I. General Overview of the Regulation of the Legal Profession in the United States

The regulation of lawyers in the United States falls under the judicial branch of government of each state. The authority of each jurisdiction to regulate a lawyer's license to practice law is not preempted by the U. S. Constitution. *See, generally, 7 Am. Jur. 2d Attorneys at Law, Sec. 2, p. 55-56.* In each state and the District of Columbia, the court of highest appellate jurisdiction has the inherent and/or constitutional authority to regulate the practice of law. *See, e.g., In re Shannon*, 876 P. 2d 548, 570 (Ariz. 1994) (noting that the state judiciary's authority to regulate the practice of law is universally accepted and dates back to the thirteenth century); *Hunt v. Maricopa County Employees Merit Sys. Comm'n*, 619 P. 2d 1036 (Ariz. 1980) (listing cases from numerous states recognizing the authority of the state supreme courts to regulate the practice of law); *In re Attorney Discipline System*, 967 P. 2d 49 (Cal. 1998) (noting that in every state the court has the power to admit and discipline lawyers); *People ex rel. Chicago Bar Ass'n v. Goodman*, 8 N.E. 2d 941, cert. den. 302 U.S. 728, reh. den. 302 U.S. 777 (1937); and *In re Intergration of Nebraska State Bar Association*, 275 N.W. 265 (Neb. S. Ct. 1937).

While a state legislature may, under its police power, act to protect the interests of the public with respect to the practice of law it does so in aid of the courts — its actions do not supersede or detract from the

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\* Esq., Of Counsel, Osborn Maledon Pa, 2929 North Central Avenue, Suite 2100, Phoenix, Arizona 85012, 602-640-9000 (T), 602-640-9324 (F), [mharrison@omlaw.com](mailto:mharrison@omlaw.com). This paper has been prepared with the assistance of Ellyn Rosen and the staff at the ABA Center for Professional Responsibility for the Annual Conference of the Canadian Institute for the Administration of Justice — “Governance of Professions, Corporations, Tribunals and Courts: Ethics Responsibility and Independence” — Le Manoir Richelieu, La Malbaie-Pointe-au-Pic, Charlevoix, Quebec, October 14-16, 2004.

powers of the courts to regulate the bar. *See, e.g., People ex rel. Chicago Bar Ass'n v. Goodman*, 8 N.E. 2d 941, cert. den. 302 U.S. 728, reh. den. 302 U.S. 777 (1937); *In re Intergration of Nebraska State Bar Association*, 275 N.W. 265 (Neb. S. Ct. 1937); and *Washington State Bar Ass'n v. State*, 890 P. 2d 1047 (Wash. 1995).

Thus, in the few states where the legislature has some involvement in the regulation of lawyers (typically funding for the lawyer disciplinary agency), the courts retain their authority. California is a good example. In addition to passing on issues relating to the funding of the system, the California legislature promulgates statutes governing the regulation of lawyers. However, the California Supreme Court has made it clear that this legislative involvement does not alter or affect its constitutional and inherent regulatory authority over the bar. Cal. Const. Art. VI. Sec. 9. *In re Attorney Discipline System*, 19 Cal. 4th 582 (1998).

Judicial regulation of the legal profession in the United States has evolved into an effective, complex, professionally-staffed enterprise. The entity responsible for investigating, prosecuting and adjudicating allegations of misconduct (violations of the rules/codes of professional conduct) at the direction of the court varies in each state. In some states the court has delegated that job to the state bar association. For example, in California the State Bar of California is considered an arm of the court for this purpose. *In re Attorney Discipline System*, 19 Cal. 4th 582 (1998). In other states, the supreme court has created an agency of the court separate from the state bar association. The Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois was created by the Supreme Court of Illinois in 1973 and is empowered to investigate, prosecute and adjudicate allegations of misconduct by lawyers. 103 Ill.2d, R. 751 through 771.

The disciplinary mechanism of each state operates under a sophisticated set of substantive and procedural rules adopted by the court. There exists a large body of regulatory case law in each jurisdiction. The current system of judicial regulation of the legal profession is largely self-funded — throughout most of the country it is paid for by the lawyers who have been granted the privilege to practice law by the state supreme courts. Nationwide, the professional staff responsible for the operation of a given disciplinary agency includes, but is not limited to, a chief disciplinary counsel and deputy or assistant disciplinary counsel whose job it is to investigate and prosecute allegations of misconduct,

investigators, paralegals, secretaries and administrative staff, auditors and probation monitors. The number of professional staff varies depending on the size of the jurisdiction.

In most states the adjudication function at the trial level is performed by a single hearing officer or a hearing panel that consists of two lawyers and a non-lawyer. In a few states, like Colorado, the adjudicator is a supreme court appointed disciplinary judge. In California, lawyer disciplinary cases are prosecuted before the State Bar Court. In those states that have an intermediate appellate tribunal, appeals are typically heard by panels of lawyers and non-lawyers, and in few instances by a state trial court judge. The State Bar Court of California has an appellate level.

Lawyer disciplinary proceedings are unique in nature. They are not entirely civil or criminal in nature, but are *sui generis* proceedings that result from the inherent regulatory authority of the courts. They are characterized by many courts as *quasi-criminal* in nature. *See, e.g., In re Alicia Tocco*, 194 Ariz. 453, 984 P.2d 539. Lawyers in disciplinary proceedings are entitled to some of the due process protections that apply to defendants in criminal proceedings. For example, lawyers are entitled to notice of the charges against them, to confront witnesses against them, to present evidence and to assert their Fifth Amendment protections against self-incrimination. *See, e.g., In re Ruffalo*, 390 U.S. 544 (1968); *Spevack v. Klein*, 385 U.S. 516 (1967); and *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963). On the other hand, courts have uniformly concluded that the Double Jeopardy Clause of the United States Constitution is not applicable in disciplinary proceedings. *See, e.g., In re Chastain*, 532 S.E. 2d 264 (S.C. 2000). In the majority of states the rules of evidence apply in disciplinary proceedings and the state's rules of civil procedure govern pre-trial practice.

In most states, the court reserves the right to impose all formal, public discipline on lawyers. The findings and conclusions of trial and other entities in the discipline system constitute recommendations to the court. The court is not bound by these findings and conclusions in determining the appropriate, ultimate discipline to impose. In some states, the court has granted the authority to the adjudicators of its disciplinary agency/board to impose some lower level sanctions. In rare instances the court has granted the disciplinary adjudicators with the authority to impose higher-level sanctions. Ultimately though, final appeals of disciplinary matters are heard by the highest court of appellate

jurisdiction. In some jurisdictions, review of recommendations in discipline cases is discretionary.

Disciplinary sanctions include admonition, reprimand, censure, suspension, disbarment, probation and restitution. The court may also order a disciplined lawyer to comply with specific conditions such as submission to drug and alcohol testing, and monitoring of client trust accounts. The court may require a disciplined lawyer to reimburse the disciplinary agency for the costs of the investigation and prosecution. An increasing number of jurisdictions have rehabilitative programs which are alternatives to formal discipline in cases which do not involve serious misconduct.

## **II. Longstanding American Bar Association Policy Supporting Judicial Regulation of the Legal Profession in the United States**

The American Bar Association has long supported state judicial regulation of the legal profession. Over thirty years ago, the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee) published *Problems and Recommendations in Disciplinary Enforcement* (1970) (the Clark Report). The Clark Committee, created in February 1967 and chaired by former U.S. Supreme Court Justice Tom Clark, conducted the first nationwide examination of lawyer disciplinary procedures in the United States.

In its Report, the Clark Committee noted that the regulation of the legal profession properly resides with the judicial branch of government and attempts by other branches of government to exercise authority over that process should be resisted. The Report further called for the centralization of the disciplinary system on a statewide basis with a single, professionally staffed disciplinary agency under the jurisdiction of the court to investigate and prosecute allegations of lawyer misconduct. The Clark Committee believed that this would not only produce greater uniformity in practice and procedure, but eliminate the political concerns that arise when members of the bar are called upon to discipline their colleagues.

In February 1989, the American Bar Association established the Commission on Evaluation of Disciplinary Enforcement (McKay Commission). The McKay Commission was asked to study the

functioning of professional discipline systems, the recommendations of the Clark Committee and the results of “post-Clark” reforms. The McKay Commission was also to formulate recommendations for action by the American Bar Association and the states.

*Lawyer Regulation for A New Century*, the Report of the McKay Commission, adopted by the ABA House of Delegates in February 1992, concluded that judicial regulation of the profession and professional responsibility must remain the highest priorities of the American Bar Association. The McKay Commission recognized that judicial regulation of the profession is a principle established in every state and advocated the continued promotion, development and support of this mode of regulating the legal profession.

In reaching its conclusions, the McKay Commission considered whether legislative regulation of lawyers would result in better protection of the public. It found no persuasive evidence that other professions are better regulated or the public better protected because of legislative control. Most importantly, the Commission found no persuasive evidence that a judicially regulated legal profession was biased in favor of lawyers and against complainants. To the contrary, it found from those non-lawyers most familiar with judicial regulation that it is a fair system.

The McKay Commission found that legislative regulation of the legal profession would impair the independence of lawyers. Additionally, judicial control over lawyer discipline would not diminish the role of the organized bar in ensuring that the public is protected from lawyers who commit misconduct. Mediation, arbitration and law practice management programs, all of which address the professional conduct of lawyers, are administered by the bar as part of an expanded system of lawyer regulation that focuses on prosecution and discipline as well alternatives to discipline in appropriate circumstances.

The *ABA Model Rules for Lawyer Disciplinary Enforcement* (MRLDE), adopted by the House of Delegates in August 1989, also advocate the courts’ exclusive responsibility for the structure and administration of lawyer discipline. The MRLDE evolved from the merging of the 1979 *ABA Standards for Lawyer Discipline and Disability Proceedings* and 1985 *ABA Model Rules for Lawyer Disciplinary Enforcement*. In August 1993, the Model Rules were further revised to reflect the policies approved in the McKay Report. They were most

recently amended in 2002 to reflect changes recommended by the ABA Commission on Multi-jurisdictional Practice Law.

### **III. The American Bar Association's Policies and Activities Relating to the Globalization of the Practice of Law**

The ABA House of Delegates adopted the recommendations of the Multi-jurisdictional Practice Commission in August 2002. The first recommendation of that Commission was that the American Bar Association reaffirm its support of judicial regulation of the legal profession. In doing so, the Association recognized that a "...number of organizations and individuals have noted that, in the European Union, a lawyer in one member state may establish a law practice in another member state with relative ease, (footnote deleted) and have proposed that jurisdictional restrictions similarly be relaxed in the United States." The Commission concluded with respect to interstate cross-border practice of law, that at the present time, the wholesale elimination of jurisdictional limits is not warranted.

The Commission stated that "[G]iven the principle of state-based judicial regulation of the legal profession, the assumptions underlying that principle, and the support of a large segment of the bar for preserving it, the ABA believes that a stronger case would have to be made that national law practice is essential and that a more measured approach will not suffice to facilitate law practice and to promote the public interest.... The ABA's conclusion is that, for the present, the judicial branch of government in each state should identify those particular interstate practices, comparable to *pro hac vice* representation, that should explicitly be authorized, because client choice and other interests in favor of multi-jurisdictional law practice outweigh the countervailing regulatory interests, and identify other reforms to facilitate and effectively regulate appropriate interstate and multi-state law practice." [www.abanet.org/cpr/mjp201a.doc](http://www.abanet.org/cpr/mjp201a.doc).

Recommendations 8 and 9 of the Commission's Report relate to the presence of foreign practitioners in the United States, and as discussed further below, are relevant to the ongoing negotiations regarding legal services and the General Agreement on Trade in Services (GATS). Recommendation 8 reiterates existing American Bar Association policy and Recommendation 9 proposes an entirely new model rule. Both of

these model rules relating to foreign practitioners were drafted in the context of how lawyers are regulated in the United States, and permit foreign lawyers to render legal services in this country in a manner that is protective of consumers.

By adopting Recommendation 8 the American Bar Association encourages jurisdictions to adopt the 1993 ABA *Model Rule for the Licensing of Legal Consultants*. This Model Rule was developed to respond, in part, to the concern of foreign lawyers. Their position was that American lawyers enjoyed a broad right of practice in other countries, or sought such a right in countries that did not afford it. Foreign lawyers, on the other hand, generally could not engage in the practice of law in the United States, even if their advice was limited to the law of their own countries, without attending an accredited American law school, sitting for the bar examination and becoming a full member of the bar. As a result, the ABA adopted this Model Rule that created a streamlined admissions process for foreign lawyers seeking to establish a law practice providing limited legal services. The Model Rule also addressed a need for greater uniformity in this area.

By 2000, twenty-four jurisdictions in the United States had adopted either the *Model Rule for the Licensing of Legal Consultants* or an alternative provision for licensing foreign legal consultants. Those states did not experience regulatory problems resulting from licensing foreign legal consultants. As a result, the Association renewed its support for foreign legal consultant licensing provisions by encouraging states that have not yet done so to adopt this 1993 ABA model. The Association is also seeking to have states with foreign legal consultant rules that vary from the ABA Model study whether they should amend their rule to conform to the ABA *Model Rule for the Licensing of Legal Consultants* in the interest of uniformity and clarity. A uniform approach by the states with respect to “licensing” foreign practitioners may impact consideration by the U.S. government regarding what, if any, extent to which it will interfere with existing state based judicial regulation of the legal profession in the context of international trade agreement negotiations.

The ABA House of Delegates also adopted Recommendation 9 of the Multi-jurisdictional Practice Commission. That Recommendation sets forth a new *Model Rule for Temporary Practice by Foreign Lawyers*. This temporary practice rule addresses issues not covered by the *Model Rule for the Licensing of Legal Consultants*. While the 1993 Model Rule permits foreign lawyers to perform limited work from established offices

in American jurisdictions, the admissions process established is impractical for foreign lawyers who only perform services in the United States on a temporary basis. A foreign lawyer negotiating a transaction on behalf of a client in the lawyer's own country may come to the United States briefly to meet other parties to the transaction and their lawyers or to review documents. In a litigation context, a foreign lawyer conducting litigation in the lawyer's home country may come to the United States to meet witnesses. It is not feasible for them to seek admission as foreign legal consultants in such circumstances. However, they should be permitted to provide these temporary and limited services in the United States.

The *ABA Model Rule for Temporary Practice by Foreign Lawyers* identifies five circumstances in which a foreign lawyer may provide legal services in the United States. It takes its definition of "lawyer" from the *ABA Model Rule for Licensing of Legal Consultants*. To come within this new Model Rule, a lawyer must be a member in good standing of a recognized legal profession in the lawyer's home country, and the members of that profession must be subject to effective regulation and discipline by a duly constituted professional body or public authority.

If that criteria is met, foreign lawyers can provide legal services in the United States on a temporary basis if they do so in association with a lawyer admitted to practice in the jurisdiction and who actively participates in the matter. A foreign lawyer would also be able to provide legal services in the United States on a temporary basis if the work is reasonably related to a pending or potential proceeding in a jurisdiction outside the United States, and the lawyer is authorized, or reasonably expects to be authorized, to appear in that jurisdiction. A foreign lawyer may also provide legal services temporarily in the United States if those services are governed primarily by international law or the law of a non-United States jurisdiction.

Additionally, a foreign lawyer could provide temporary legal services in the United States if those services are reasonably related to a pending or potential alternative dispute resolution proceeding that has a nexus to the lawyer's practice in the lawyer's jurisdiction of admission. This part of the Model Rule recognizes that lawyers may be asked to participate in arbitrations, mediations or other alternative dispute resolution proceedings (other than those that are court-affiliated) anywhere in the world.



The new Model Rule also provides that foreign lawyers can temporarily provide legal services in the United States if the services are for a client who resides or has an office in a jurisdiction where the lawyer is authorized to practice or if the services are reasonably related to a matter that has a substantial connection to such a jurisdiction. The scope of the work the lawyer could perform would be limited to the services the lawyer may perform in the authorizing jurisdiction. For example, if a German lawyer came to the United States to negotiate on behalf of a client in Germany, the lawyer would be authorized to provide only those services that the lawyer is authorized to provide for that client in Germany. A foreign lawyer may also be authorized as a foreign legal consultant in one United States jurisdiction and cite that authority as the basis for temporary presence in a second United States jurisdiction. If so, the lawyer can provide in the second jurisdiction only those services that the lawyer is authorized to perform in the jurisdiction in which the lawyer is a foreign legal consultant.

The American Bar Association places a high priority on encouraging the adoption of all of its policies governing the multi-jurisdictional practice of law. The ABA Center for Professional Responsibility's Joint Committee on Lawyer Regulation is responsible for disseminating the Association's multi-jurisdictional practice policies to the state supreme courts, the organized bar, lawyer disciplinary agencies and the public. Additionally, the Joint Committee seeks implementation of these policies and works directly with the states to assist them in studying these important issues.

The Association also recognizes that regulation of foreign lawyers by the states is of interest to the United States Trade Representative (USTR) in connection with the ongoing negotiations under the General Agreement on Trade in Services (GATS). The issue of legal services and corresponding regulatory implications will continue to arise in the context of other international trade agreement negotiations. In recognition of the importance of these issues, the ABA Center for Professional Responsibility, the Joint Committee on Lawyer Regulation and the Transnational Practice Committee of the ABA Section of International Law and Practice have taken an active role in publicizing information and educating members of the judiciary and the organized bar regarding the General Agreement on Trade in Services (GATS) and its impact on the regulation of the legal profession.

The Center has also created a web site, with the invaluable assistance of Professor Laurel Terry of the Penn State Dickinson School of Law, relating specifically to GATS and other International Trade Agreements. This web site contains a large amount of background information to familiarize users with the GATS negotiations, such as the Executive Summary of the International Bar Association GATS Handbook. The site also contains action documents related to the GATS that U.S. state supreme courts and the organized bar should consider, as well as documents that the U.S. Government has already filed or received with respect to legal services. The Center is working to make this site more user-friendly and will continue to update it regularly. The Center's GATS website is located at [http://www.abanet.org/cpr/gats/gats\\_home.html](http://www.abanet.org/cpr/gats/gats_home.html).

The Association will continue to promote its policies and to study and work not only with state and local bar associations in the United States regarding these important issues, but with the bar leaders and their organizations worldwide.